26

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No 582.

ALEXANDER C. M. PENNINGTON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 5, 1913.

(23,731)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1913.

1 In the Court of Claims.

No. 31,962.

ALEXANDER C. M. PENNINGTON
v.
THE UNITED STATES.

I. Petition.

[Filed December 10, 1912.]

To the Honorable the Court of Claims:

The claimant, Alexander C. M. Pennington, respectfully represents:

I. That he is a citizen of the United States and a brigadier-general of the United States Army on the retired list.

II. He was appointed a cadet in the United States Military Academy on the 1st day of July, 1855, and served as such cadet until the first day of July, 1860, when he was appointed brevet second lieutenant of the Second Artillery, United States Army, and so served until the first day of February, 1861, when he was appointed second lieutenant in the same regiment, and so served until the 14th day of May, 1861, when he was appointed first lieutenant of the same regiment, and so served until he was appointed captain in the First Regiment of Artillery, United States Army, on the 30th day of March, 1863. While so serving as captain in the United States Army aforesaid, he was appointed colonel of the Third Regiment, New Jersey Cavalry Volunteers, on the first day of October, 1864, and served as such colonel until he was honorably mustered out
2 of volunteer service on the first day of August, 1865. That thereafter he served as captain aforesaid in the United States Army until the 8th day of November, 1882, when he was appointed major of the Fourth Regiment of Artillery in the United States Army, and so served until the 28th day of November, 1892, when he was appointed lieutenant-colonel of the same regiment, and so served until the 29th day of October, 1896, when he was appointed colonel of the Second Regiment of Artillery, United States Army. While so serving, he was appointed a brigadier-general of volunteers on the 4th day of May, 1898, and was honorably discharged from the volunteer service on the 12th day of April, 1899, and continued thereafter to serve as colonel in the United States Army aforesaid until the 16th day of October, 1899, when he was appointed a brigadier-general in the United States Army, and so served until the 17th day of October, 1899, when he was placed upon the retired list, and has since served upon the retired list of the United States Army.

III. At the time of his appointment and service as second lieutenant, first lieutenant, and captain aforesaid, commissioned officers of

the Army of the United States were entitled to an increase of their compensation on account of the length of time served by them in the Army of the United States, the same being under the following provisions of law:

Act of July 5, 1838, Sec. 15, 5 Stat. L. 358:

"That every commissioned officer of the line or staff exclusive of general officers shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the Army of the United States."

3 Revised Statutes, Sec. 1262:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

IV. During the entire period of his service as second lieutenant, first lieutenant and captain aforesaid, the practice of the War Department and of the accounting officers of the Treasury Department was not to count service as a cadet in the United States Military Academy in reckoning the term of five years of service for purposes of the additional ration provided by the act of July 5, 1838, or for longevity increase of pay under Sec. 1262 of the Revised Statutes.

V. It was decided by the Supreme Court of the United States on the 27th day of October, 1884, in the case of United States v. Morton, 112th Volume of United States Reports, p. 3, and on the 11th day of March, 1889, in the case of United States v. Watson, reported in the 130th Volume of United States Reports, p. 80, that officers of the United States Army were entitled, in computing their rations under said act of July 5, 1838, and in computing their longevity pay under Sec. 1262 of the Revised Statutes, to be credited with their service as cadets in the United States Military Academy.

VI. Notwithstanding said decisions of the Supreme Court of the United States, the Second Comptroller of the Treasury, on June 20, 1890, decided that he would not allow any claim for additional rations under Sec. 15 of the act of July 5, 1838, aforesaid, and for increase of longevity pay under Sec. 1262 of the Revised Statutes on account of any service not theretofore admitted as forming
4 a proper subject of credit by the previous practice of the Treasury Department as aforesaid.

VII. On the 18th day of May, 1908, the Comptroller of the Treasury decided in the case of Lieutenant Alexander O. Brodie, that in the future the decisions of the Supreme Court of the United States in the cases aforesaid would be followed by the accounting officers of the Treasury in claims for additional rations and longevity pay aforesaid, based upon service as a cadet at the Military Academy at West Point. But it was decided by said Comptroller in various cases, particularly in the case of Lieutenant Brodie aforesaid, and of Colonel Albert Todd on the 3d day of January, 1911, that the accounting officers of the Treasury would not reopen any claim as aforesaid in

which a settlement or adjudication had once been made by any of their predecessors.

VIII. After the decisions of the Supreme Court aforesaid in the Morton and Watson cases, a claim was presented by this claimant to the Second Auditor of the Treasury for additional rations and longevity pay due under the acts aforesaid in accordance with the decisions of the Supreme Court aforesaid, and said claim was disallowed by the Second Auditor in accordance with the decision of the Second Comptroller of the Treasury of June 20, 1890, as hereinbefore set forth, and no consideration was given by said Auditor to the interpretation of said statutes made by the Supreme Court in said cases.

IX. Your petitioner applied to the Auditor for the War Department in July, 1909, for all arrears of pay then due on account of his service aforesaid, particularly for additional rations and longevity pay on account of his service aforesaid as a cadet in the Military Academy. The Auditor for the War Department refused to consider said claim because of the settlement aforesaid dated December 13, 1890, by the Second Auditor then in office, disallowing said claim.

X. On the 4th day of March, 1907, a provision of law was passed by Congress as a portion of the annual Sundry Civil Appropriation Act, 34 Stat. L. 356, as follows:

"Back pay and bounty: For payment of amounts for arrears of pay of two and three-year volunteers, for bounty to volunteers, and their widows and legal heirs, for bounty under the act of July 28, 1866, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury, during the fiscal year 1908, $200,000:

"*Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors."

XI. Your petitioner respectfully represents that by said provision of statute, there was granted to your petitioner a right to be paid additional rations under said act of 1838, and additional longevity pay under said Sec. 1262 of the Revised Statutes for the reason that the decisions of the Supreme Court of the United States and of the Court of Claims of the United States aforesaid held that such rations and longevity pay were due in a similar case, and such decisions should have been followed by said accounting officers notwithstanding the former settlement or adjudication by one of their predecessors as aforesaid. The refusal of the accounting officers of the Treasury aforesaid to state a balance in favor of your petitioner on account of the former settlement aforesaid, deprived your petitioner of a right granted under said act of Congress, for which there is no remedy except by action in this court.

XII. The amount due to this claimant for additional rations as aforesaid under said act of July 5, 1838, and for longevity

pay under Sec. 1262 of the Revised Statutes, is three thousand three hundred and twenty-two dollars and ninety-three cents, which he hereby claims.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant prays judgment for three thousand three hundred and twenty-two dollars and ninety-three cents ($3,322.93).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

WM. B. KING.

Subscribed and sworn to before me this 9th day of December, 1912.

MARIE A. SEARLES,
[SEAL] *Notary Public.*

7 *II. Demurrer.*

In the Court of Claims of the United States.

No. 31,962.

ALEXANDER C. M. PENNINGTON
v.
THE UNITED STATES.

Defendant demurs to claimant's petition in the above-entitled cause for the reason that the same does not state facts sufficient to constitute a cause of action against the United Sates.

Respectfully submitted.

F. DE C. FAUST,
Acting Assistant Attorney General.

W. F. NORRIS, *Attorney.*

8 *III. Argument and Submission.*

This case was argued on the 5th day of May, 1913, by Mr. William B. King and Mr. George A. King for the claimant, and by Hon. W. F. Norris for the defendants, and submitted.

IV. Opinion.

BARNEY, *J.*, delivered the opinion of the court:

The question for decision in this case arises upon the demurrer of the defendants to the plaintiff's petition. The plaintiff's attorneys in their brief have very aptly epitomized the allegations of the petition as follows:

(1) The claimant was a cadet in the Military Academy from July 1, 1855, to July 1, 1860, when he was commissioned in the United States Army, where he is still serving, being now on the retired list.

(2) While serving as a commissioned officer he was entitled to longevity pay, that is, to an increase of pay for every five years of service in the Army of the United States.

(3) The War and Treasury Departments then held that officers were not entitled to count for purposes of longevity pay the service rendered at the Military Academy.

(4) The Supreme Court in United States v. Morton (112 U. S., 3), decided October 27, 1884, and United States v. Watson (130 U. S., 80), decided March 11, 1889, held that officers of the Army were entitled to count cadet service in computing longevity pay.

(5) The Second Comptroller of the Treasury refused in 1890 to follow the decisions of the Supreme Court in the Morton and Watson cases and the claimant's claim for longevity pay based on the construction of law upheld by the court in these cases was denied by the second comptroller.

(6) A later comptroller in 1908 decided that the decision of the Supreme Court of the United States should be followed for the future by the accounting officers.

(7) But he held that cases once rejected should not be reopened, and the auditor refused to consider the claimant's case because of the prior adverse settlement of the second auditor.

The plaintiff seeks to recover in this suit by virtue of a provision in the sundry civil appropriation act of March 4, 1907 (34 Stat. L., 1356), which is as follows:

"Back pay and bounty: For payment of amounts for arrears of pay of two and three year volunteers, for bounty to volunteers, and their widows and legal heirs, for bounty under the act of July 28, 1866, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury, during the fiscal year 1908, $200,000:

9 "*Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors."

It is the contention of the plaintiff that the last clause of said provision, though nominally a proviso, is in fact a separate and

independent statute, and that, in addition to the cases mentioned in the first clause, it provides for another entirely separate class of cases of which the case at bar is one; while on the other hand it is contended by the defendants that the second clause of the statute in question is a genuine proviso, and was added for the purpose of explaining and amplifying the first clause, and applies only to the class of cases therein mentioned. Some other collateral questions were presented and discussed in the briefs of both parties, but upon the oral argument before the court it seemed to be conceded that the question above stated was all there was to be considered in the disposition of the demurrer in this case. It doubtless must be conceded that if this proviso was an independent piece of legislation, not in any way connected with any other statute, it would have the effect claimed by the plaintiff.

The object to be attained in the construction of statutes is to ascertain and give effect to their true intent and meaning. If this intent and meaning is expressed in plain and unambiguous language, a bare reading suffices and there is no room for invoking any of the various rules of interpretation, for, as it is sometimes said, it interprets itself, or it is not allowable to interpret what has no need of interpretation. Where, however, there is any uncertainty or ambiguity in the language used in a statute, the true intent of the law-making power must be sought after under certain well-established rules of interpretation. It must always be borne in mind, however, that whatever intent and meaning is given to a statute by construction, it must be consistently within its language, for it is the duty of courts to construe statutes, but not to make them.

In construing the statute in question, it is first to be considered that it is a proviso attached to the appropriating clause of the statute, and to determine the effect of that fact upon its interpretation. A proviso has been defined by one of the standard writers on statutes as something engrafted upon a preceding enactment, and as being legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them. (Dwarris on Statutes, 514.) The Supreme Court has said: "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." (Wayman v. Southard, 10 Wheat. 1, 30.) These definitions convey the idea that it is the office of provisos to restrict rather than enlarge the operation of the enacting clause. The fact that the opposite is often the object sought by a proviso is recognized in the case of Georgia Banking Co. v. Smith (128 U. S., 174), where it is said:

"The difficulty attending the construction of the clause following this one arises from the doubt attached to the meaning of the term 'provided.' The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of

securing amendments to them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it." (Ibid., 181.)

The practice, however, is so common for Congress to enact independent and permanent legislation by provisos appended to appropriation bills that courts are constrained to take judicial notice of this fact, as remarked by the late Chief Justice Richardson in Henry v. United States (27 C. Cls., 142, 144). Notwithstanding this well known established practice, however, it still remains the duty of courts to recognize the general rule as to the office of provisos to the extent at least of the presumption of their having some relation to the enacting clause to which they are attached. In other words, to interpret them together as constituting one expression of the legislative intent, and to limit the proviso to a modification or explanation of such intent if that is fairly within its interpretation. The courts should not go afield to give a far reaching and important effect to a proviso far beyond and in addition to its modification of the statute to which it is attached. However often Congress may enact independent legislation by way of a proviso, the presumption and the prevailing practice is otherwise, and where a statute is presented for construction with a proviso attached, it is the duty of the court to construe them together as one enactment if that is reasonably within their terms. This rule is recognized by the Supreme Court in White v. United States, 191 U. S., 545, where in discussing the office and interpretation of a proviso, it is said:

"It is undoubtedly true that in Congressional legislation provisos have been included in statutes which are really independent pieces of legislation, but this is a misuse of the usual purpose and effect of a proviso, which is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. Minis v. United States, 15 Pet., 423. If possible, the act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law. 1 Kent, 463. The purview of the act and the words of the proviso must be reconciled if may be, and the operation of the proviso may be limited by the scope of the enacting clause." (Ibid, 551.)

Applying this rule to the statute under consideration what is the result? The enacting clause appropriates a specified sum, "For payment of amounts for * * * [not mentioning cases like the plaintiff's] that may be certified to be due by the accounting officers of the Treasury." The proviso follows and amplifies this enactment by stating how such "amounts" are to be determined, i. e.,
11 the decisions of the Supreme Court and the Court of Claims are to be followed by such accounting officers regardless of

former settlements or adjudications made by their predecessors. Upon its face a plainer statute was never written, and were it not for the fact that there were other cases where the decisions of the courts had conflicted with the adjudications of the accounting officers, no one would have ever dreamed that there was any room for its construction or interpretation.

Much stress is placed by the plaintiff upon the fact that the word "all" is put in the proviso just preceding the word "cases." True that word was not needed to embrace the cases named in the enacting clause, but it is not seldom that useless modifying words and phrases are employed in statutes and other important papers. If the author of the Declaration of Independence had said that "men are created equal," etc., the doctrine intended would have been literally expressed but he saw fit to be more rhetorical and said "all men are created equal," etc.

Our attention has also been called to the fact that this proviso mentions "decisions of the Supreme Court" as well as decisions of the Court of Claims, while as a matter of fact the claims provided for in the appropriating clause have never been passed upon by the Supreme Court, but that the class of cases to which the plaintiff's belongs has been. This fact was pressed upon the court with much vigor and legal acumen at the oral hearing as a circumstance showing that the proviso was general legislation instead of a mere interpretation and enlargement of the first clause. It must be admitted that there is considerable force in this contention and it has been duly considered. It is not, however, believed to have the effect of taking from the proviso its character and effect as such, when we take into consideration its otherwise plain application to the first clause only. It would be dangerous to charge upon Congress a intention to enact independent legislation so important in its results, because of its use of a few superfluous words in a clause of a statute, named and having all of the characteristics of a proviso.

We have no right to resort to mere conjecture in the construction of a statute to determine the intent of Congress where its terms are clear and explicit, but if we were to do so in this case it is unbelievable that Congress ever intended to make the proviso in question applicable to a class whose claims have been the subject of so much litigation and notice as that class to which the plaintiff's claim belongs. Congress has sent more than a hundred similar claims to this court for findings of fact under the Tucker Act and has sent most, if not all, of them here since the enactment of the statute under consideration. If it had intended to give jurisdiction to this court to render judgment in that class of cases why has that been done.

When construed in connection with the appropriation clause to which it is attached the proviso in question is so plain and simple that its meaning can not be misunderstood, and we do not believe it is within the province of a court to take it from its given connection, and thus give it a sweeping application to such an important class of cases not particularly named.

It follows from the foregoing that the demurrer should be sustained and the claimant's petition dismissed, and it is so ordered.

12 *V. Judgment of the Court.*

In the Court of Claims.

No. 31,962.

ALEXANDER C. M. PENNINGTON
v.
THE UNITED STATES.

At a Court of Claims held in the City of Washington, D. C., on the 19th day of May, 1913, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree that the petition of the claimant, the said Alexander C. M. Pennington, be, and the same is hereby dismissed.

BY THE COURT.

13 *VI. Application for, and Allowance of, Appeal.*

In the Court of Claims.

Term 1912–1913.

No. 31,962.

ALEXANDER C. M. PENNINGTON
v.
THE UNITED STATES.

Appeal.

From the judgment rendered in this case on the 19th day of May, 1913, the claimant, Alexander C. M. Pennington, by his attorneys of record, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Presented and allowed in open court, May 26, 1913.

Whereupon it was ordered that the appeal be allowed as prayed for.

14 In the Court of Claims.

No. 31,962.

ALEXANDER C. M. PENNINGTON
v.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing pages are true transcripts of the pleadings in the above-entitled cause, of the opinion filed by the Court, of the judgment of the Court dismissing the petition and of the application for, and allowance of appeal to the Supreme Court of the United States.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 23,731. Court of Claims. Term No. 582. Alexander C. M. Pennington, appellant, vs. The United States. Filed June 5, 1913. File No. 23,741.

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Supreme Court of the United States.

October Term, 1913.

No. 582.

ALEXANDER C. M. PENNINGTON, Appellant,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

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Supreme Court of the United States.

October Term, 1913.

ALEXANDER C. M. PENNINGTON, *Appellant*, v. THE UNITED STATES. } No. 528.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. STATEMENT OF CASE.

The claimant, Alexander C. M. Pennington, filed his petition in the Court of Claims December 10, 1912 (rec. p. 1). The United States demurred (rec. p. 4). The demurrer was sustained and the petition dismissed (rec. pp. 8–9). From that judgment the claimant has appealed to this court.

The Court of Claims, in its opinion by Judge Barney, delivered May 19, 1913, thus accurately summarized the facts of the petition and the respective contentions of the parties (rec. p. 5):

"The question for decision in this case arises upon the demurrer of the defendants to the plaintiff's petition. The plaintiff's attorneys in their brief have very aptly epitomized the allegations of the petition as follows:

"1. The claimant was a cadet in the Military Academy from July 1, 1855, to July 1, 1860, when he was com-

missioned in the United States Army, where he is still serving, being now on the retired list.

"2. While serving as a commissioned officer he was entitled to longevity pay, that is, to an increase of pay for every five years of service in the Army of the United States.

"3. The War and Treasury Departments then held that officers were not entitled to count for purposes of longevity pay the service rendered at the Military Academy.

"4. The Supreme Court in *United States* v. *Morton* (112 U. S. 3), decided October 27, 1884, and *United States* v. *Watson* (130 U. S. 80), decided March 11, 1889, held that officers of the Army were entitled to count cadet service in computing longevity pay.

"5. The Second Comptroller of the Treasury refused in 1890 to follow the decisions of the Supreme Court in the *Morton* and *Watson* cases and the claimant's claim for longevity pay based on the construction of law upheld by the court in these cases was denied by the Second Comptroller.

"6. A later comptroller in 1908 decided that the decision of the Supreme Court of the United States should be followed for the future by the accounting officers.

"7. But he held that cases once rejected should not be reopened, and the auditor refused to consider the claimant's case because of the prior adverse settlement of the Second Auditor [and Second Comptroller].

"The plaintiff seeks to recover in this suit by virtue of a provision in the sundry civil appropriation act of March 4, 1907 (34 Stat. L. 1356), which is as follows:

"'Back pay and bounty: For payment of amounts for arrears of pay of two and three year volunteers, for bounty to volunteers, and their widows and legal heirs, for bounty under the act of July 28, 1866, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury, during the fiscal year 1908, $200,000;

"'*Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of

the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors.'

"It is the contention of the plaintiff that the last clause of said provision, though nominally a proviso, is in fact a separate and independent statute, and that, in addition to the cases mentioned in the first clause, it provides for another entirely separate class of cases of which the case at bar is one; while on the other hand it is contended by the defendants that the second clause of the statute in question is a genuine proviso, and was added for the purpose of explaining and amplifying the first clause, and applies only to the class of cases therein mentioned.

"Some other collateral questions were presented and discussed in the briefs of both parties, but upon the oral argument before the court it seemed to be conceded that the question above stated was all there was to be considered in the disposition of the demurrer in this case.

"It doubtless must be conceded that if this proviso was an independent piece of legislation, not in any way connected with any other statute, it would have the effect claimed by the plaintiff."

II. ASSIGNMENT OF ERROR.

The appellant hereby assigns the following error in the proceedings and judgment of the Court of Claims:

That said court held that the proviso of the act of March 4, 1907, above set forth, did not include the claim of the appellant and gave judgment accordingly, dismissing his petition.

III. BRIEF OF ARGUMENT.

Appellant's Propositions.

The case of the appellant rests upon the following propositions of law:

1. That the above proviso in the act of March 4, 1907, is an acknowledgment of the indebtedness of the United States to all persons whose claims are therein described and, as a new promise, takes their claims out of the operation of the statute of limitations.

2. That upon the refusal of the accounting officers to allow a claim as directed by this proviso, an action may be maintained upon the claim in the Court of Claims because it is a claim "founded upon * * * any law of Congress" (Judicial Code, Sec. 145, par. 1st).

3. That this claim is within the scope of the proviso.

Position of the Court Below.

The opinion of the court below conceded the first and second of the above propositions, but denied the third, saying, rec. p. 6:

"Some other collateral questions were presented and discussed in the briefs of both parties, but upon the oral argument before the court it seemed to be conceded that the question above stated was all there was to be considered in the disposition of the demurrer in this case."

It was held that the scope of the proviso was confined to the classes of cases for which appropriation was made by the clause preceding the proviso.

The pending issue is whether the proviso governs the action of the accounting officers "in all cases" thereafter certified by them or only in all such cases as are within the class appropriated for in the clause preceding the proviso.

The Court of Claims starts (opinion, rec. p. 6, as quoted, *ante*, p. 3) with a concession of much importance:

"It doubtless must be conceded that if this proviso was an independent piece of legislation not in any way connected with any other statute, it would have the effect claimed by the plaintiff."

The reasons for holding that it has a different effect are:

(1) That the office of a proviso is "to restrict rather than enlarge the operation of the enacting clause," rec. p. 6;

(2) That "where a statute is presented for construction with a proviso attached, it is the duty of the court to construe them together as one enactment, if that is reasonably within their terms," rec. p. 7;

(3) That the action of either House of Congress in sending claims to the Court of Claims for findings under the Tucker Act (Sec. 14 of the act of March 3, 1887, 24 Stat. L. 507, now Judicial Code, Sec. 151) is inconsistent with jurisdiction to render judgment under the act of 1907, rec. p. 8.

These will be severally considered.

Appellant's Responses to the Court.

(1) The Proviso Not Restrictive.

In *White* v. *United States*, 191 U. S. 545, it is said that "the usual purpose and effect of a proviso * * * is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation." The Court of Claims treats this definition as controlling the construction of the present proviso.

But this proviso does none of these things.

The appropriating clause is of a definite sum of money to pay claims of particular classes during one fiscal year. The proviso reaches beyond that fiscal year and is permanent in time. It prescribes a new rule of indefinite duration for the action of the accounting officers. All this is not only plain on the face of the proviso, especially from the use of the word "hereafter," but it received this contemporary construction in the practice of the

Treasury Department (13 Comp. Dec. 597). It is a permanent change of administrative practice.

This proviso is therefore not a proviso "of the usual purpose and effect" as defined by this court in *White* v. *United States*, above quoted, or "a genuine proviso" to adopt the term used by the Court of Claims in this case, *ante*, p. 3. It is what is known in legislative parlance as a "rider," that is, an independent provision of permanent substantive legislation attached to a clause of an appropriation act.

This court has had frequent occasion to consider such provisos on appropriation acts, as well as provisos on other acts of wider scope than the clauses to which they are attached.

In *Hadden* v. *The Collector*, 5 Wall. 107, 110, 111, the court makes these remarks on the multifarious character of provisions in appropriation acts:

"These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title. Thus the law regulating appeals in Mexican land cases to the District Courts of the United States from the board of commissioners, created under the act of March 3d, 1851, is found in an act (10 Stat. L. 99) entitled 'An act making appropriations for the civil and diplomatic expenses of the government for the year ending June 30th, 1853, and for other purposes.' The law declaring that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried, is contained in a proviso to a section in the appropriation act of 1864 (13 Stat. L. 351), the section itself directing an appropriation for detecting and punishing the counterfeiting of the securities and coin of the United States.

"The words 'for other purposes,' frequently added to the title in acts of Congress, are considered as covering every possible subject of legislation."

The title of the act here under consideration is "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1908, and for other purposes" (34 Stat. L. 1295).

In *Georgia Banking Company* v. *Smith*, 128 U. S. 174, 181, the court thus states recent legislative usage:

"The difficulty attending the construction of the clause following this one arises from the doubt attached to the meaning of the term 'provided.' The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

Legislative customs have changed since the declaration by Mr. Justice Story in *Minis* v. *United States*, 15 Pet. 423, in the year 1841, that "it would be somewhat unusual to find" general legislation on appropriation acts. This very act of March 4, 1907, 34 Stat. L. 1295, contains about twenty paragraphs of substantive legislation, while the Sundry Civil Appropriation Act of March 4, 1911, 36 Stat. L. 1363, contains over forty.

The relations of the United States with Cuba were fixed by a proviso on the Army Appropriation Act of March 2, 1901, 31 Stat. L. 897; and civil government in the Philippines was established by another provision in the same act, 31 Stat. L. 910.

The proper rule of construction in view of the present

legislative practice has never been better stated than by the late Chief Justice Richardson in *Henry* v. *United States*, 27 C. Cls. 144, as follows:

"The long practice of Congress in enacting general legislation by *provisos* in appropriation acts is so well known to all persons familiar with the statutes of the United States, that the court can not avoid taking judicial notice of it, and, in interpreting appropriation acts, giving due consideration to that fact, so that the will of Congress shall be carried out in whatever form it may be expressed."

In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, a contention was made very similar to that made on behalf of the United States in this case. In the opinion of Mr. Justice Day, it is said, pp. 36, 37:

"In support of the motion to dismiss it is argued that the language of the proviso of section 3, above quoted, 'shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission,' must be read in connection with preceding paragraphs of the section, which provide for bringing actions by direction of the Attorney-General in the Circuit Courts of the United States, and do not include proceedings of the character of the present action to compel the production of books and papers and the giving of testimony by witnesses called before the commission.

"It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. *Minis* v. *United States*, 15 Pet. 423; *Austin* v. *United States*, 155 U. S. 417, 431; *White* v. *United States*, 191 U. S. 545, 551. It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be ad-

mitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before."

And the conclusion was reached, pp. 37, 38:

"The provision in the statute under consideration being intended to enlarge rather than limit the application of previous terms should not receive so narrow a construction as to defeat its purpose. It extends the terms of the act of February 11, 1903, to 'any case' brought under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

That proviso used the term "to any case"; the proviso now under consideration reads "in all cases." The latter is at least as broad a phrase and should receive as broad a construction.

In *United States* v. *Falk*, 204 U. S. 143, a question arose much like the present. Congress enacted as a part of the tariff act of 1897, 30 Stat. L. 213:

"Sec. 33. That on and after the day when this act shall go into effect all goods, wares and merchandise, previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof; *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

The principal clause which opens this section is temporary, applying only to goods which had been imported or were under bond at the passage of the act. This court held that the proviso was not limited to this class of goods but was an independent and general enactment and governed all future cases of importations. The Attorney-General, in an opinion on this same question, which was expressly approved by this court in rendering this decision, 204 U. S. 149, said, 20 Op. 82:

"To limit the effect of this proviso to the subject-matter of section 50 would be to discriminate in favor of importations made prior to the taking effect of this act as against importations under the act. Such construction would not only put prior importations upon an equality with importations under the act as to rate, but would give them an advantage in the matter of weight. Such intention is not to be presumed."

This language is directly applicable to the present case. To limit the effect of the pending proviso to claims arising during the Civil War would simply be to give to these claims an advantage over all others. There is certainly no presumption in favor of such a discrimination between different classes of accounts and no intelligent reason can be assigned for it. The reason of the statute concurs with its literal reading.

The statutes in that case and the pending case are very similar. In both cases, the grammatically most important clause is temporary and limited in scope; in both, the proviso is permanent and general in language; in both, a general meaning must be given to the proviso, if a complete remedy is to be effected and unjust discrimination avoided. In the earlier case, the proviso was held permanent and general; here it has been already held permanent. Consistency requires it to be also held general.

This discussion has shown:

(1) That the usual effect of a proviso is restrictive of the preceding clause;

(2) That a frequent use of a proviso is as substantive legislation, not restrictive of the preceding clause;

(3) That this proviso is of the latter class.

Although a proviso may be of one or the other of the above kinds, it can not at once be restrictive and enlarging. When it is once ascertained to be of a permanent substantive character, it should no longer be construed as limited by the appropriation clause to which it is attached. It becomes subject to the general rules for the construction of all statutes. As was said in *Lake County* v. *Rollins*, 130 U. S. 662, 670:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."

It has been well said by the Supreme Court of Alabama, *Carroll* v. *State*, 58 Ala. 396, 401:

"It does not necessarily follow because the term *provided* is used, that which may succeed it is a *proviso*, though that is the form in which an exception is generally made to, or a restraint or qualification imposed on the enacting clause. It is a matter of the succeeding words, and not the form, which determines whether it is or not a technical *proviso*.

The Court of Claims is right in saying (rec. p. 6, quoted, *ante*, p. 3):

"It doubtless must be conceded that if this proviso was an independent piece of legislation, not in any way connected with any other statute, it would have the effect claimed by the plaintiff."

But since it has been ascertained that this proviso is permanent legislation and not a restriction on the preceding appropriation, this is a concession of the appellant's whole case.

(2) No Controlling Presumption from Position.

The Court of Claims says that a statute and an accompanying proviso are to be construed as one enactment, if that is reasonably within their terms. The importance of this principle is much weakened in its application to this case by the fact that this proviso is permanent legislation, not a mere restriction upon the preceding appropriation, as has been already seen, and by the concession of the Court of Claims, that this proviso, if independent legislation, would have the meaning claimed by appellant.

Any presumption arising from the rule so stated can be entirely overcome by consideration of both the language and purpose of the proviso, as has been seen in the cases cited. Thus the proviso cited from the act of 1864, in *Haddock* v. *The Collector*, 5 Wall. 107, 110, quoted, *ante*, p. 6, against exclusion of witnesses on account of color, if construed according to the rule applied by the Court of Claims to the proviso now under consideration, would have been limited to the testimony of witnesses in counterfeiting cases. But the words used and the mischief to be cured demanded a wider meaning and the proviso was held to be general legislation, extending beyond the preceding appropriation.

The same reasons exist here. The proviso is to be read as general in scope on the following grounds:

(*A*) That the terms of the statute do not permit the restricted meaning placed upon them by the Court of Claims;

(*B*) That the existing mischief was general and demanded a general remedy.

(*C*) That a decision for the appellant does justice to meritorious claimants.

(A) The Language of the Statute.

This will be considered in detail, although perhaps unnecessary in view of the concession of the Court of Claims.

"*In All Cases.*"

(*a*) The opening words are, "That in all cases." The Court of Claims holds that these words mean, "in all cases of the classes herein appropriated for," or "in all such cases." But to express this meaning, we have to read something into the law in order to restrict the generality of the term "all."

No such qualification of the word "all" can be implied. This court in *McLean* v. *United States*, 226 U. S. 383, has recently said:

"'All' excludes the idea of limitation."

The Court of Appeals of Virginia said, *Moore* v. *Virginia Insurance Company*, 28 Gratt. 508, 516:

"A more comprehensive word than 'all' can not be found in the English language."

In *Kellett* v. *Kellett*, 94 Tex. 206, a statute providing that the judgment of a certain court shall be conclusive in "all cases" of divorce, was held to mean that no exception was intended even where rights of property were involved.

In *Prindle* v. *United States*, 41 C. Cls. 8, Congress provided in the opening clause of a section, for the pay of "officers of the line of the Navy and of the Medical and Pay Corps." This was followed by one proviso "that *such* officers when on shore shall receive" certain pay and allowances and another proviso "that when *naval* officers

are detailed for shore duty beyond seas, they shall receive" a certain different rate of pay. The opening clause and the first proviso clearly relate only to officers of the line and of the Medical and Pay Corps. The second proviso, because it did not use the term "such officers," but "naval officers," was held to extend to all officers of the Navy, whether of the classes enumerated in the opening clause or not. The court said, p. 11:

"To read into this proviso the word 'such' after the word 'when' would certainly confine its operation within much narrower limits than Congress intended and do violence to the general object and scope of the enactment; most certainly it would be inequitable and harsh."

This decision goes much farther than is here required; for the word "all," here expressed, was there implied.

This court has had before it the exact correlative of the present case. In *United States* v. *Bowen*, 100 U. S. 508, the Revised Statutes read "all such pensioners" and it was insisted that this should be read "all pensioners." This argument found force in the fact that the statute before the revision read "all pensioners." The presumption that a statute was not changed by the revisers was expressly stated, p. 513, but the language quoted was held sufficient to rebut this presumption. This court said, p. 513:

"The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution and no sound canon of construction will authorize us to disregard it, when to do so changes very materially the meaning of the section."

Just as "all such" in that statute could not be read "all," so here "all" can not be read "all such.' Yet this must be done to support any construction which will make its scope narrower than to include "all cases."

The accounting officers of the Treasury, whose duties are here regulated, have jurisdiction over "all claims and demands whatever" by or against the United States (R. S. Sec. 236). "All cases" in this statute possesses the same universality.

"*So Certified.*"

(*b*) The words "so certified" are not a qualification of the character of the cases but of the manner of certification.

In *Blanton* v. *State*, 1 Wash. 265, 269, it is said:

"The adverb 'so' is defined by Webster as meaning 'in the same manner as has been stated; in this or that condition or state; under these circumstances; in this way; with reflex reference to something just asserted."

If then we read "hereafter so certified" to mean "hereafter certified in the same manner as has been stated" and make a reflex reference to the preceding part of the statute, we find the phase of manner there to be "by the accounting officers of the Treasury."

The word "so" is an adverb of manner, qualifying "certified." It can not be converted into an adjective, "such," qualifying "cases." To do this would imply the legislator's ignorance of both the meaning of words and the rules of grammar. This court has said in *United States* v. *Goldenberg*, 168 U. S. 95, 102:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar."

Congress has thus enacted "that in all cases," that is cases of any character, hereafter "certified to be due by the accounting officers of the Treasury," the administrative rule of *res judicata* shall not prevail against a judicial decision.

"*Hereafter.*"

(*c*) The word "hereafter" distinctly negatives the idea that the operation of this proviso is to be limited to the appropriation made by this act.

It has already been shown that the Treasury Department has treated it as permanent, under a contemporaneous decision by the Comptroller, 13 Comp. Dec. 597. No other decision was possible, for the word "hereafter" distinctly declares this. It is the opposite of the phrase "during the present fiscal year," or "under this appropriation." It frequently accompanies provisos in appropriation acts and is always used to make the legislation permanent. See note on this subject, Supplement to Revised Statutes, vol. 2, p. 93, note 9.

The proviso therefore itself answers all questions needed for its interpretation. What class of cases is included? Those "certified by the accounting officers of the Treasury." What cases in this class? "All cases." When so certified? "Hereafter."

The rule applied by this court in *United States* v. *Fisher*, 109 U. S. 143, 145, is "that, if possible, effect must be given to every clause, section, and word of the statute."

In *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 58, this court said:

"But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."

In this case the Court of Claims was only able to reach the conclusion it did by eliminating the word "all" as superfluous.

General Purpose Expressed.

(*d*) Another reason appears on the very face of the proviso for not restricting its operation to Civil War

claims. The Court of Claims thus treats the argument on this point:

"Our attention has also been called to the fact that this proviso mentions 'decisions of the Supreme Court' as well as decisions of the Court of Claims, while as a matter of fact the claims provided for in the appropriating clause have never been passed upon by the Supreme Court, but that the class of cases to which the plaintiff's belongs has been. This fact was pressed upon the court with much vigor and legal acumen at the oral hearing as a circumstance showing that the proviso was general legislation instead of a mere interpretation and enlargement of the first clause. It must be admitted that there is considerable force in this contention and it has been duly considered. It is not, however, believed to have the effect of taking from the proviso its character and effect as such, when we take into consideration its otherwise plain application to the first clause only. It would be dangerous to charge upon Congress an intention to enact independent legislation so important in its results, because of its use of a few superfluous words in a clause of a statute named and having all of the characteristics of a proviso."

Here again the Court of Claims has treated some of the language of the statute as "superfluous words." Plainly they are so unless they include this class of cases.

No decision of this court authorizing "payment of amounts for arrears of pay of two and three year volunteers," etc., as provided for in the clause preceding the proviso, has been made since the decision in *United States* v. *Hosmer*, 9 Wall. 432, at December term, 1869, under which all pending claims were settled up soon after its recommendation, leaving no ground for complaint.

On the other hand, this court at nearly every term has made some decision in a test case of some class or other, to which this provision is applicable, if construed in a

general sense. The most recent case was *Plummer* v. *United States*, 224 U. S. 137. It has been necessary to bring separate suits in the Court of Claims in many individual claims, valid under that decision, but rejected by the accounting officers before it was made. (See Sen. Doc. 924, 62d Cong. 2d Sess. p. 2.)

The injustice to these army longevity claims had been publicly recognized by seventeen favorable committee reports in the two houses of Congress on general relief bills and the passage of such bills by the Senate three times before the date of this proviso. (See "Longevity Pay Claims of United States Army Officers," Government Printing Office, 1912.) The presumption is very strong that, when Congress directed the accounting officers to follow the decisions of this court, "in all cases" * * * "without regard to former settlements or adjudications," it had in mind this frequently discussed instance in which this court had rendered a decision in favor of these claims which the predecessors of the present accounting officers had refused to carry out.

(B) A General Mischief and a General Remedy.

If the literal terms of this statute require this broad construction, it is equally necessary to effect a remedy of the mischief requiring cure. The existing mischief was general; the remedy must be equally general.

The mischief was this. If the accounting officers of the Treasury decide against claims of a class, a test case is often brought in the Court of Claims to reverse this decision. If the final judicial decision is in favor of the claimant, the accounting officers will follow the judicial decision as to cases not once decided by them. See 13 Comp. Dec. 707; 14 Comp. Dec. 151, 802; 15 Comp. Dec. 124; *Meigs* v. *United States*, 20 C. Cls. 181, 187. They will refuse to follow it in cases once decided ad-

versely to the claimant, holding to an executive rule of *res judicata*. This practice is alleged in this petition, par. VII, rec. p. 2, and is shown in many published decisions of the Comptroller, as in 14 Comp. Dec. 804.

Congress recognized that the interpretation of a statute by the courts in a test case ought to govern the accounting officers "in all cases" * * * "without regard to former settlements or adjudications by their predecessors." It so declared by the act of March 4, 1907.

Defendants contend that the remedy given by the act of March 4, 1907, is limited to claims for volunteer pay in the Civil War. No reason can be suggested why Congress should limit the scope of the application of judicial decisions to one class of cases rather than to another. Why should the decisions of the Supreme Court and Court of Claims be followed in cases arising in the Civil War and be disregarded in all other cases? Why should executive decisions be subject to reconsideration for error of law in Civil War claims and be final in all other claims? Why should judicially declared errors of law be corrected in Civil War claims and perpetuated in all other cases? If the accounting officers should be required to conform to the decisions of the courts in Civil War claims, it is an equally good rule for them to follow such decisions "in all cases," as says this statute.

Thus the mischief which existed when this act was passed is general and the remedy must be general to reach the evil.

In *Leigh* v. *United States*, 43 C. Cls. 374, this very statute was applied to the case of a naval officer for pay while on duty in the Philippine Islands. The opinion of the court, after quoting the act now under examination thus comments upon it, p. 387:

"Thus by express legislation as well as the rulings of the Supreme Court, the decisions of the Court of Claims,

when not appealed from, furnish the rules by which the accounting officers are to be guided in their settlement and adjustment of like cases."

This is wholly contrary to the construction of the same statute in the present case.

Near the conclusion of the opinion, the Court of Claims says, rec. p. 8:

"We have no right to resort to mere conjecture in the construction of a statute to determine the intent of Congress where its terms are clear and explicit, but if we were to do so in this case it is unbelievable that Congress ever intended to make the proviso in question applicable to a class whose claims have been the subject of so much litigation and notice as that class to which the plaintiff's claim belongs."

No reason is given why it is unbelievable, except that these claims "have been the subject of so much litigation and notice." That is a reason why Congress should have been willing to furnish a mode to dispose of them through ordinary channels of administration, by the assertion of a sound general principle, especially when coupled with the uniformly favorable action repeatedly taken by the committees of both Houses of Congress and by the Senate.

(C) Justice to Meritorious Claimants.

The application of this statute to this claim is to give a remedy to a long denied right. The petition states the facts accurately as they also officially appear in the decision of the Comptroller of the Treasury in *Brodie's* case, 14 Comp. Dec. 795.

This court in *United States* v. *Watson*, 130 U. S. 80, in 1889, decided that Military Academy service should be counted in the calculation of longevity pay. The Second Comptroller declared that he would not follow this decision and disallowed this and all other like claims (see

petition, pars. V, VI, VIII, rec. pp. 2, 3). The Paymaster General of the Army in an official report (Sen. Rep. 468, 57th Cong. 1st Sess. p. 4) correctly said of this decision:

"The officers of the Treasury had no more right to deny this pay to the claimants than any other moneys due them. It is certainly an arbitrary ruling maintained by force."

A later Comptroller in 1908 decided to follow the decision of this court (petition, par. VII, rec. p. 2, *Brodie's* case, 14 Comp. Dec. 795), but this claim could not be paid because of the prior rejection. In making this decision the Comptroller said, 14 Comp. Dec. 802:

"The decisions of the Court of Claims and of the Supreme Court of the United States upon a construction that should be placed upon an act of Congress, are not law in the sense that statutes are law, but they are the highest evidence of the meaning of the statute which is the law, and in that sense they are binding not only upon the accounting officers but upon all other officers and persons over whom the sovereignty of the United States extends.

"The asserted doctrine that because the construction placed upon the act of 1838 by the accounting officers prevailed for a long period of time, such construction should be persisted in notwithstanding the Court of Claims and the Supreme Court had decided that such construction was wrong and contrary to law, I do not think can be sanctioned. To do so, is to perpetuate error, overthrow the law, and deny to a worthy class of men the rights which the law clearly gives to them. In other words, the Supreme Court of the United States being the ultimate tribunal to determine the meaning of statutes enacted by Congress, the accounting officers are not justified in setting up their judgment in conflict with the decision of the Supreme Court in such cases upon the assumption that such decision is unreasonable, or because it is in conflict with a long standing practice of the accounting officers."

The interpretation declared by this court has since been applied to all claims afterward presented. But the accounting officers have refused to allow the many claims presented shortly after the decision of this court in the Watson case and then disallowed, because, under the rule already stated, the prior adjudication, even when made in defiance of the ruling of this court, made the claim *res judicata* in the Department.

It is well said in an official publication entitled "Longevity Pay Claims of United States Army Officers," Government Printing Office, 1912, p. 30:

"This shows a reversal of the usual rule of *vigilantibus et non dormientibus jura subveniunt*, in that those officers who applied promptly on the Supreme Court announcing its decision in a test case, had their claims rejected through what is now admitted to have been an error on the part of the then Second Comptroller, while those claimants who did not apply at that time, but who waited until a correct practice was established 20 years later, have received their pay."

It was to prevent just such capricious failures of justice by the application of so inequitable a rule that Congress in 1907 legislated, as we have seen, requiring the accounting officers to follow the decisions of this court "in all cases" * * * "without regard to former settlements or adjudications by their predecessors."

The mischief was general, requiring a general remedy, but the particular mischief in this class of cases conspicuously called for a remedy whereby the supremacy of the judiciary could be asserted against the usurpation of power by a former executive.

(3) Subsequent Reference of Claims.

The final argument of the Court of Claims in support of its decision is this (rec. p. 8):

"Congress has sent more than a hundred similar claims to this court for findings of fact under the Tucker Act and has sent most, if not all, of them here since the enactment of the statute under consideration. If it had intended to give jurisdiction to this court to render judgment in that class of cases why has that been done."

The Tucker Act, here referred to, is Sec. 14 of the act of March 3, 1887, 24 Stat. L. 507, amended by the act of June 25, 1910, 36 Stat. L. 837, now appearing in the Judicial Code, Sec. 151.

The argument of the court is that the intent of the Congress which passed the act of 1907 is shown by the action of later Congresses. To this we answer:

(1) The action of the later Congresses does not show the meaning of an earlier Congress. Its acts must speak for themselves. The courts, not the succeeding Congresses, are the authoritative interpreters of these acts.

(2) Such references of claims are made by a single house of Congress and do not show the view of Congress thereon.

(3) When passing a resolution of reference of such claims as this under this act, the house of Congress did not consider judicially whether such claims were embraced within the proviso of the act of 1907. Without such consideration, the resolution can have no force as a construction of the act of 1907.

(4) The act, see Judicial Code, Sec. 151, last proviso, allows judgment to be entered in claims referred under it, if found to be within the general jurisdiction of the Court of Claims. It also gives the court power to express an opinion whether claims so referred are "legal or equitable." Congress may have referred such claims with special reference to these provisions.

(5) The reference of such claims, as stated, and the later attitude of Congress towards them accredits them as

valid and just claims, entitled to payment. See action of House of Representatives, 62d Congress, in including a number of them in the Omnibus Claims bill, H. R. 19, 115, and the action of the Senate in adding more individual claims and a mandate to pay the entire class, as well as the comments of the Senate Committee on Claims in reporting them (Sen. Rep. 770, 62d Cong. 2d Sess. p. 14), and equally favorable views of the minority in Part II of same report, p. 8. But for the failure of this bill in conference over contested items, they would have been paid. Thus Congress has not only given a mandate in the act of 1907 to the accounting officers of the Treasury to follow the decisions of this court "in all cases," but has shown a disposition to provide for the examination and payment of all unsettled claims of this particular class, where the accounting officers have failed to act upon them through the usual Treasury procedure.

Jurisdiction and Limitation.

The opinion of the court below says, rec. p. 6:

"Some other collateral questions were presented and discussed in the briefs of both parties, but upon the oral argument before the court it seemed to be conceded that the question above stated was all there was to be considered in the disposition of the demurrer in this case."

These collateral questions were:

(1) Does the proviso in question afford ground for the jurisdiction of this court in a case within its scope?

(2) Can a suit be brought upon this statute as upon a new promise, where the original cause of action originated more than six years before the institution of the suit?

Since these questions were conceded below, only a brief reference to them need be made at this time.

JURISDICTION OF THE COURT OF CLAIMS.

The jurisdiction is based upon that portion of Section 145 of the Judicial Code giving the Court of Claims jurisdiction to hear "all claims founded upon * * * any law of Congress."

The chief authority is *Medbury* v. *United States*, 173 U. S. 492. A statute declared that where certain entries of public lands had been erroneously allowed, "the Secretary of the Interior shall cause to be repaid to the person who made such entry" the fees, commissions and purchase money paid upon the entry. The Secretary refused repayment and the entryman brought suit. The court said, p. 497:

"The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done, and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and we look in vain for any in the act itself. We can not suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right."

In *McLean* v. *United States*, 226 U. S. 374, the act under which suit was brought said (p. 377) that "the

proper accounting officers be, and they are hereby, directed to settle and adjust" a certain claim. On the question of jurisdiction, the court said, p. 378:

"The jurisdiction of the Court of Claims to entertain the action was attacked in that court and is attacked here, the contention being that the act for the relief of appellant 'constituted the accounting officers and not the courts the tribunal to settle the accounts.' The court ruled against the contention, and rightly. It is not necessary to repeat its reasoning. The duties of the accounting officers were, as the court said, administrative, not judicial, and as the rights of appellant arose under an act of Congress the court had jurisdiction to determine them. *Medbury* v. *United States*, 173 U. S. 492."

See also *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, 104 U. S. 728.

The principle deducible from these cases is that, where named executive officers are directed to allow a class of claims and no remedy is provided for their failure to give the beneficiaries what is thus granted to them, any individual of the class has a remedy in the Court of Claims.

The application of this doctrine to the present case is clear. The accounting officers are directed by the act of 1907 to follow the decisions of this court or the Court of Claims "without regard to former settlements or adjudications." This is a recognition by Congress of the right of all claimants whose right is recognized by the courts. It is a direction to those officers to allow all claims which the courts say are just, whether once wrongfully rejected or not.

This claimant had a claim, the petition says (pars. I–V, rec. pp. 1–2), within the *Morton* and *Watson* decisions. The accounting officers refused to follow those decisions in this case on account of the previous settlement by their predecessors (par. IX, rec. p. 3). There is thus a grant

of a right by Congress and a refusal by the executive to recognize the right. Hence, as this court has said, *Medbury* v. *United States*, 173 U. S. 497, *ante*, p. 25, "there is a remedy in the Court of Claims." It is an exact occasion for the operation of the principle stated in *Pollard* v. *Bailey*, 20 Wall. 527, that "a liability created by statute without a remedy may be enforced by an appropriate common-law action," as declared applicable to proceedings in the Court of Claims in *United States* v. *Kaufman*, 96 U. S. 567, 569.

LIMITATION AND A NEW PROMISE.

The suit is here brought upon the act of 1907 as upon a new promise. This court has recognized that a new promise will sustain the jurisdiction of the Court of Claims under the limitation contained in Rev. Stat. Sec. 1069, Judicial Code, Sec. 156.

In *United States* v. *Wardwell*, 172 U. S. 48, the original cause of action originated prior to 1869. In that year checks were drawn on the Assistant Treasurer of the United States in payment. These were destroyed by fire in 1872. The administratrix of the payee applied for the issuance of duplicate Treasury warrants in payment. This was refused on April 14, 1890, and suit was brought on April 10, 1896. Here both the cause of action on the original claim and on the original checks were long since barred. The action was on the statute declaring unpaid checks "outstanding liabilities." It was declared that this constituted a continuing promise on which the limitation did not run until demand and refusal. This court said, p. 58:

"This was a distinct and separate promise, creating a new liability, and the claim accrued when this new liability matured."

A number of cases have come before the Court of Claims in which Congress has provided by either general or special legislation, for the payment of claims previously barred by limitation.

In *Hukill* v. *United States*, 16 C. Cls. 562, the original cause of action was long since barred by limitation when an appropriation was made to pay a certain class of claims. Upon the refusal of the Secretary of the Treasury to make any payments, suits were brought in this court upon the appropriation act as a new promise. The court said, p. 565:

"When, therefore, Congress made the appropriation in question, it was as if the United States said to this claimant, and every other of like kind,—'the legality and justice of paying you for the service you rendered in carrying the mails under your contract with the United States, in 1859, 1860, or 1861, are recognized.'

* * * * * * *

"The right of the parties to assert and maintain their claims, once recognized and affirmed by Congress, became thenceforth, in virtue of that act, an acknowledged right against the United States, which this court is bound to take cognizance of under its general power 'to hear and determine all claims founded upon any law of Congress.'"

This was followed in *Mordecai* v. *United States*, 19 C. Cls. 11, 14; *Blount* v. *United States*, 21 C. Cls. 274, 278.

In *Simms* v. *United States*, 19 C. Cls. 601, the doctrine was declared, p. 610:

"When Congress appropriate money generally, as for the annual expenses of the government, no legislative intent can be inferred to renovate a claim or class of claims barred by the statute of limitations. But when Congress appropriate money for the payment of a designated claim or class of claims already barred by the statute of limitations, it must be inferred that the legislative intent was to give a new promise founded upon the old consideration. In such cases, the statute of limitations begins to

run from the enactment of the appropriation act. So when Congress give legal efficacy to a designated claim or class of claims which were not legal rights, or which were rights without a remedy, it must be intended that the newly created claims should accrue from the passage of the enabling act or from the happening of some event prescribed therein."

See also *Miller* v. *United States*, 34 C. Cls. 335, 340, construing the opinion of this court in *United States* v. *Wardwell*, 172 U. S. 48, *ante*, p. 27.

It is thus the settled law of the Court of Claims, resting upon a decision of this court, that a renewed recognition by Congress of a class of claims is a new promise to sustain an action upon a claim of this class theretofore barred by limitation.

It is true that there is no appropriation in the act of 1907 for this class of claims but legislative recognition is given to them by the direction to the accounting officers to settle them. The legislative recognition is the essential; the form of its expression is immaterial. The existence of a right independent of appropriation is ably stated in *Collins* v. *United States*, 15 C. Cls. 22, where the court says, p. 35:

"This court, established for the sole purpose of investigating claims against the Government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments. (Rev. Stat. Sec. 1059.) That such liabilities may be created where there is no appropriation of money to meet them is recognized in section 3732 of the Revised Statutes."

* * * * * * *

"The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court. In *Graham's case* (1 C. Cls. R. 381), where Congress appropriated a sum less than the amount of the

salary established by law for the office which the claimant held, it was determined that he was entitled to the full amount of the established salary, and he recovered judgment therefor."

A new promise to a class, relieving all of the class from the bar of limitation, has been recognized in the State courts.

In *Underhill* v. *City of Sonora*, 17 Cal. 172, bonds of the city had become barred by limitation, but the legislature subsequently passed acts reincorporating the city and authorizing additional taxes to liquidate the outstanding debt. These acts were held to withdraw the bonds from the operation of limitation. The court said, p. 177:

"The legislative acts, then, recognize the debt and make provision for its payment. This is enough to withdraw the case from the operation of the statute."

In *Quaker City National Bank* v. *City of Tacoma*, 27 Wash. 259, a warrant payable out of a special street improvement fund became barred by limitation. The city thereafter created a special fund out of which payment of warrants previously issued for improvements was authorized. It was held that the plaintiff was entitled to recover out of this special fund upon a new promise arising out of the act creating it, notwithstanding the bar of limitation had attached to his original cause of action.

Conclusion.

We submit that the following propositions are established:

1. The proviso to the act of March 4, 1907, must be construed to create a general rule of action applicable to "all cases" within the jurisdiction of the accounting officers, for the following reasons:

(*a*) The words of the proviso are inconsistent with any other construction;

(*b*) The existing mischief is general and the remedy, to be effective, must be general;

(*c*) The application of this proviso to the class of claims represented by the pending case remedies inequality and promotes justice.

2. The accounting officers having refused, on account of a former settlement by their predecessors, to follow a decision of this court, have violated the mandate of this statute, and the claimant, being injured, has a right to sue in the Court of Claims as upon "a law of Congress."

3. The statute is a new promise, creating a new cause of action.

A decision in favor of this appellant will enforce the authority of this court in the interpretation of acts of Congress; it will rebuke the disregard of its decision by an executive officer; it will do justice in a meritorious class of claims.

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SUPREME COURT, U.S.
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No. 587.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ALEXANDER C. M. PENNINGTON, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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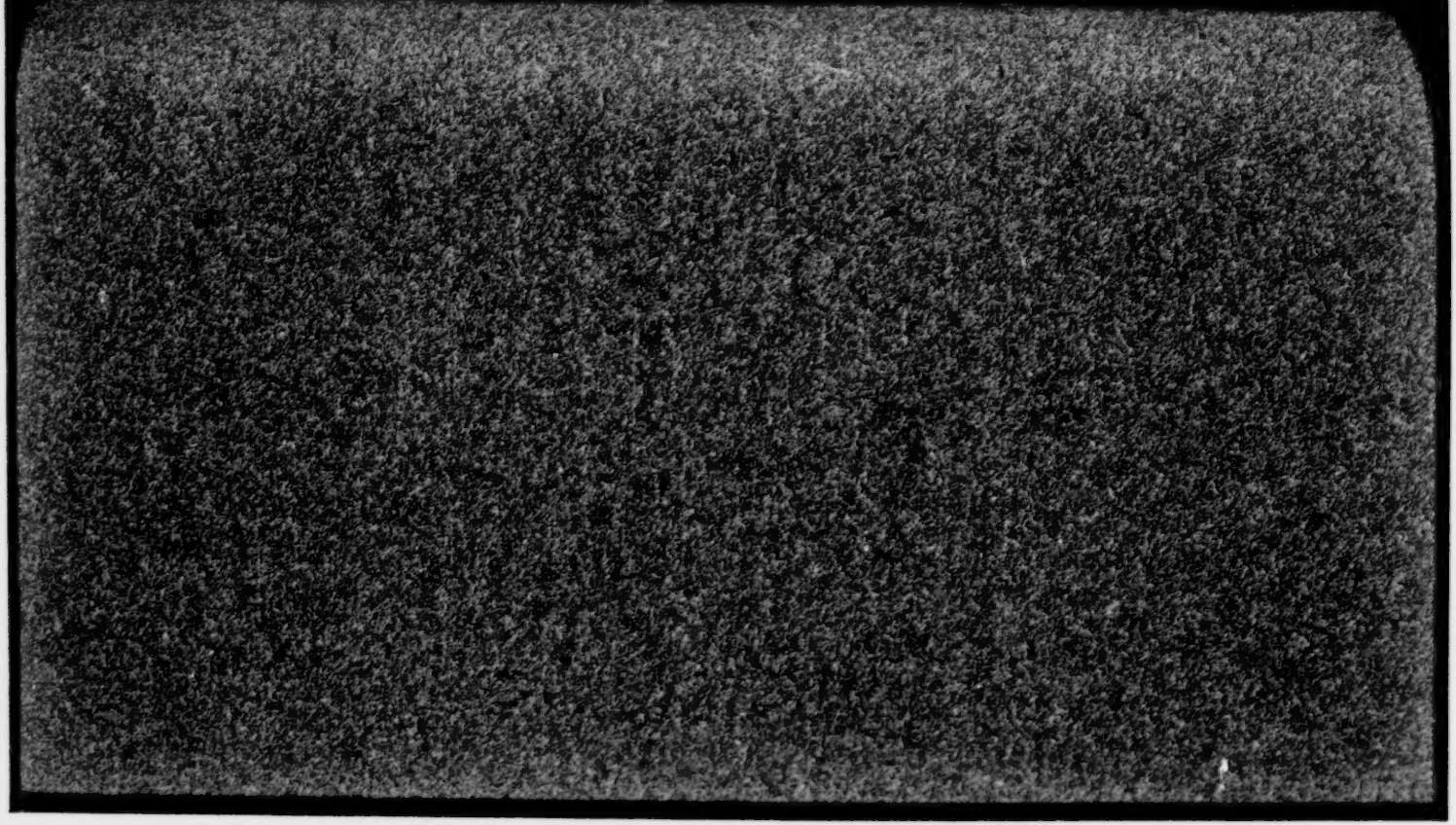

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ALEXANDER C. M. PENNINGTON, appellant,
v.
THE UNITED STATES.
No. 528.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF CASE.

The appellant, a retired officer of the Regular Army, brought this action in the Court of Claims to recover increased longevity pay, based upon service while a cadet of the United States Military Academy. He seeks to recover by virtue of a provision in the sundry civil appropriation act of

March 4, 1907 (34 Stat. L., 1356), which reads as follows:

> Back pay and bounty: For payment of amounts for arrears of pay of two and three year volunteers, for bounty to volunteers and their widows and legal heirs, for bounty under the act of July twenty-eighth, eighteen hundred and sixty-six, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, *that may be certified to be due* by the accounting officers of the Treasury during the fiscal year nineteen hundred and eight, $200,000: *Provided*, That in *all cases hereafter so certified* the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors. (Italics ours.)

APPELLANT'S POSITION.

Appellant contends as follows:

(1) That the *proviso* of said provision is a separate and independent statute.

(2) That in addition to the five classes of cases, mentioned in the first clause of said provision, it provides for the payment of claims under an entirely separate class of cases, of which the case at bar is one, i. e., a claim for increased longevity pay of an officer of the United States Army, based upon service while a cadet of the United States Military Academy, which claim has been rejected more than

six years past by the accounting officers of the United States Treasury.

APPELLEE'S POSITION.

The Government asserts—

First. That the *proviso* is an integral part of the previous provision providing for the payment of "*back pay and bounty*" found by the accounting officers of the United States Treasury to be due any person in the five classes therein named, to wit, (a) arrears of pay of two and three year volunteers; (b) volunteer soldiers of the Civil War, their widows and legal heirs; (c) bounty under the act of July 28, 1866; (d) for amounts for commutation of rations to prisoners of war in rebel States, and (e) to soldiers on furlough.

Second. That the *only claims* that may be certified under the provisions of the act in question are those for "*back pay and bounty*" therein set forth.

The Government demurred to appellant's petition on the ground that the same did not state facts sufficient to constitute a cause of action against the United States, and the demurrer was sustained. (Op. R., p. 4.)

II.

ARGUMENT.

The provisions in the act in question are, in our opinion, so plain and unambiguous that we have hesitated to add any explanation. We submit, however, a very brief argument.

Answering the first contention of appellant, i. e., that the *proviso* in question is a separate and inde-

pendent statute, we rely upon the doctrine often announced by this court to the effect that a proviso modifies or "restrains the generality of the previous provisions." (*Savings Bank* v. *United States*, 19 Wall., 227–236.) In this connection we call attention to the fact that wherever quoted in this record the provision of the statute in question has been divided, no doubt inadvertently, into two paragraphs, separated by a semicolon. (Petition, p. 3; opinion, p. 5; appellant's brief, pp. 2, 3.)

It will be seen by reference to the statute that the proviso, so called, and the appropriating clause are included in one paragraph, separated by a colon. (34 Stat. L., 1356.) The proviso is, therefore, more closely connected with the "previous provisions" than appears in the record and counsel's brief. Even the arrangement and punctuation link the proviso to the appropriating clause.

Standing alone, as a separate and independent paragraph, this proviso has more the *appearance* of being an independent statute than it does when it is printed in juxtaposition with the appropriating clause, where it properly belongs.

It will be noted that the first clause of the paragraph quoted has for its prime object the appropriation of money—$200,000—to be paid by the Secretary of the Treasury to certain persons upon the certificate of the "accounting officers of the Treasury."

The *proviso* merely directs that the accounting officers, in making up the certificates upon which

the $200,000 is to be disbursed, shall be guided by the decisions of the Supreme Court of the United States and the Court of Claims in determining the amount due a claimant within any of the five classes provided for in the preceding clause.

In the five classes named we do not find that class which appellant would like to have us read into this provision; i. e., officers of the Regular Army who are entitled to longevity pay under the decisions of the Supreme Court in the *Morton case* (112 U. S., 3) and the *Watson case* (130 U. S., 80).

In our opinion the appropriating clause is susceptible of the following analysis:

There shall be "back pay and bounty" paid individuals coming under five classes *only*.

Of those five classes only those shall be paid whose claims "may be certified to be due by the accounting officers of the Treasury during the fiscal year 1908."

Then follows the *proviso*, prescribing a rule of procedure for the accounting officers in respect to the claims that "may be certified," and the language which ties the *proviso* to the enacting clause is the phrase, "all cases hereafter so certified." This phrase appearing in the proviso refers back to the phrase of the appropriating clause which states that claims "may be certified by the accounting officers."

If it were true, as appellant contends, that the *proviso* is an independent statute, then may it not be asked to whom does the proviso refer when it

uses the words "accounting officers," and the phrase "all cases"?

Following appellant's contention to its last analysis, would, we think, throw down the bars of the statute of limitation to longevity-pay cases, and to all other cases of any kind or nature whatsoever for which a claim may have been presented to the accounting officers of the Treasury and payment of the same refused. In other words, would not such a construction as that for which appellant contends give the Court of Claims jurisdiction over any and every kind of claim against the Government upon which the accounting officers have acted or may act? It is impossible to believe that Congress ever intended such a sweeping change, and extension of the jurisdiction of the Court of Claims.

We are of the opinion that every proposition advanced by counsel for appellant in their brief is fully answered by the opinion of the Court of Claims. (R., p. 5.) The judgment of the court dismissing the petition is so strongly justified by its opinion that we are satisfied to rest our case upon this opinion.

CONCLUSION.

We therefore respectfully submit that the judgment of the lower court in sustaining the demurrer of the Government to appellant's petition should be affirmed.

HUSTON THOMPSON,
Assistant Attorney General.

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